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In the Court of Claims of the United States.

INDIAN DEPREDATIONS.

JOHN E. BARROW AND O. H. P. CRAIG,
surviving partners of the firm of Bar-
row, Porter & Co.,

vs.

THE UNITED STATES AND THE MO-
HAVE, Cosnejo, and Navajo bands or
tribes of Indians.

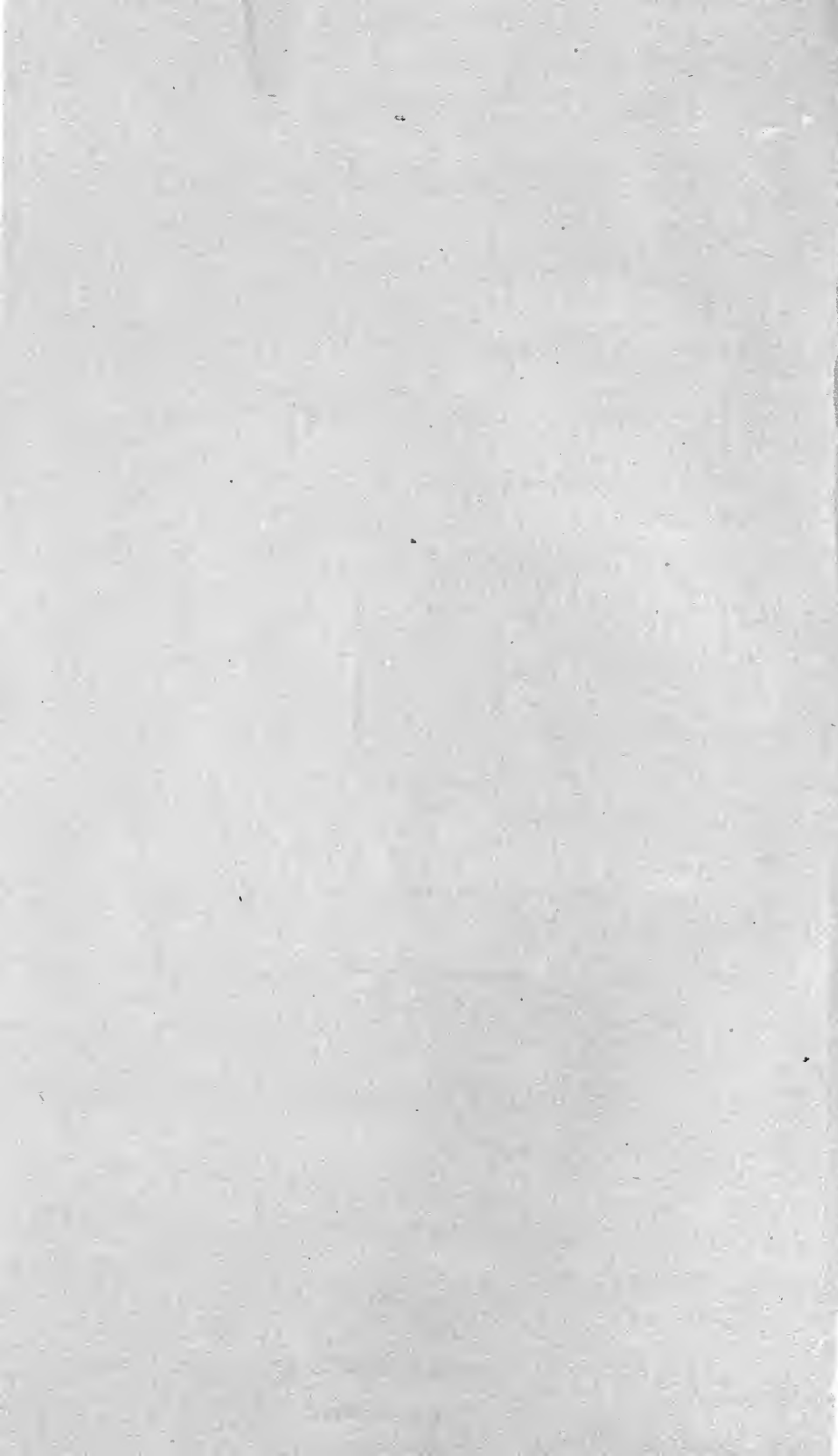
No. 31.

DEFENDANTS' REQUEST FOR FINDINGS OF FACT—
OBJECTIONS TO FINDINGS OF FACT RE-
QUESTED BY CLAIMANTS—BRIEF
AND ARGUMENT OF COUN-
SEL FOR DEFENSE.

L. W. COLBY,
Assistant Attorney-General.

Indian of North America in Claims

Colby, Leonard Wright, 1848-1925.



In the Court of Claims of the United States.

INDIAN DEPREDACTIONS.

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| vs. | |
| THE UNITED STATES AND THE MO- have, Cosnejo and Navajo bands or tribes of Indians. | |

DEFENDANTS' REQUEST FOR FINDINGS OF FACT AND OBJECTIONS TO FINDINGS OF FACT REQUESTED BY CLAIMANTS.

I.

Counsel for the defense objects to the second and third findings of fact requested by claimants.

II.

The defendants, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, request the court to find the same as follows :

(1) The property alleged to have been lost did not, at the time and place, exceed \$12,209 in value.

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(2) The articles of property which are shown, by competent evidence, to have been lost are 37 mules, 1 horse, 1 pony, 4 coaches, 5 sets of harness, and an uncertain quantity of provisions.

(3) These articles, shown by competent evidence to have been lost, were, at the time and place, worth not to exceed the following prices: Mules, \$150 each; horses, \$150; pony, \$75; coaches, \$275 each; wagon, \$150; harness, \$40 per set; provisions, \$700.

(4) The claimants, prior to bringing suit in this court, had filed before Congress and the Interior Department, the one February 14, 1860, the other January 16, 1886, a claim for remuneration for a loss at the hands of Navajo, Mohave, and Cosnejo Indians, of 47 mules, 1 pony, 1 mail coach, 1 freight wagon, harness, and provisions, all together of the alleged value of \$10,600.

(5) The value of the property enumerated in the memorial to Congress and in the affidavit filed in the Interior Department did not, at the time and place, exceed \$8,325.

(6) The evidence shows that the depredation upon the Colorado River was committed by Indians, but does not show that it was committed by members of the defendant Mohave tribe of Indians.

(7) The evidence does not show that all or any part of the alleged depredations were committed by members of the defendant Cosnejo band or tribe of Indians.

(8) The evidence does not show that all or any part of the alleged depredations were committed by members of the defendant Navajo band or tribe of Indians.

(9) The defendant Navajo band or tribe of Indians were not in amity with the United States at the time of the alleged depredations.

(10) The defendant Cosnejo band or tribe of Indians were neither in amity nor in treaty relations with the United States at the time of the alleged depredations.

(11) The defendant Mohave band or tribe of Indians were neither in amity nor in treaty relations with the United States at the time of the alleged depredations.

(12) The following public documents are referred to and relied upon by the defense, and it is requested that they be incorporated in the findings of fact :

Senate Documents, second session Thirty-fifth Congress, Vols. I and II ; Senate Documents, first session Thirty-sixth Congress, Vols. I, II, and III.

L. W. COLBY,
Assistant Attorney-General.

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BRIEF AND ARGUMENT OF COUNSEL FOR DEFENSE.

I.

STATEMENT OF CASE.

In the year 1858 the firm of Barrow, Porter & Co., then composed of John E. Barrow, James Porter, and A. L. H. Crenshaw, entered into contract with the Government to carry the mail from Kansas City, Mo., to Stockton, Cal. After the contract had been made and before operations had begun thereunder, the firm was enlarged by the admission of Patrick L. McLaughlin and O. H.

P. Craig. These five composed the firm at the time of the different depredations on account of which suit is here brought. A Harry Edwards, it seems, had been admitted into the firm after the mail contract was taken, but had withdrawn before the time of the losses here enumerated, he selling his interest to Mr. Craig. The several interests of these different partners were, according to the testimony of Mr. Craig, equal, but according to that of Mr. Barrow he himself had a one-third interest and each of the others one-sixth. (Rec., 12, and unprinted deposition of John E. Barrow, p. 4.) P. L. McLaughlin, James Porter, and A. L. H. Crenshaw are now dead.

The claim has heretofore been presented to Congress and also before the Indian Office, but no action was had thereon.

The question of the citizenship of the different members of the firm will not be touched upon in the argument of the defendants. The attention of the court is merely directed to the fact that Mr. McLaughlin was alien-born (Rec., 15, and unprinted deposition of John E. Barrow) and to the question as to whether the presumption which thus arises against his citizenship is overcome by the testimony of Mr. Barrow in his later and unprinted deposition.

II.

VALUE OF PROPERTY NOT IN EXCESS OF \$12,209.

The evidence would seem to show that the values of the several articles of property alleged to have been lost, with the exception of the mules, is properly set forth in

the petition. The prices there given for the mules is substantiated by the evidence of all the witnesses except Mr. Craig, one of the partners. He, on being asked how he arrived at the value of the property, said, with reference to the mules (Rec., 15):

I arrive at it in this way: Mules of the kind and character taken were worth in New Mexico at that time from \$150 to \$200 each, and it required considerable expense to take them from there to the point to which they were taken.

Now, a good part of these mules are alleged to have been taken by the Navajo Indians at Zuñi Station, N. Mex. We might well suppose, then, that these were not worth more than \$150 each. As most or all of the others seem to have been in actual service on the road all the way from New Mexico to the places where they were lost, the process of getting them there would seem to be attended with profit rather than expense. Then the \$50 added to the price of each mule for his transportation should be deducted. This would be in harmony with the schedule of prices followed by the Indian Office, where values were looked into with much nicety. Indeed, unless a mule was a very superior animal he was not worth more than \$150. It was usual to find a few \$200 mules in every outfit. Wheel mules were often worth that amount, but leaders seldom. It is submitted that \$150 each for the mules is a nearer approach to their proper value. Upon this basis of computation the various articles of property enumerated in the petition do not exceed \$12,209 in value.

III.

EVIDENCE AS TO AMOUNT AND VALUE OF PROPERTY
LOST.

The petition sets forth the loss of various articles of property valued in the aggregate at \$17,634. The evidence does not substantiate this either as to the amount of property lost or as to the valuation placed thereon. According to this the extent of the loss is not beyond \$8,225.

Samuel F. Gilbert testifies to a loss at Zuñi Station at the hands of the Navajoes of 13 mules, worth from \$200 to \$225 each, and 1 horse, worth \$300 or \$350. He also testifies to a loss on the Colorado River at the hands of the Mohave Indians of "20 or 21" mules valued at \$200 each, 1 pony worth \$75, 1 wagon worth \$150, 5 sets of harness worth \$250, a quantity of provisions worth from \$1,200 to \$1,500, and 4 Concord coaches, the value of which he is unable to give.

Wesley Cooper testifies to the loss at Zuñi Station of "not less than 15 or 16 mules" and 1 horse, the mules of the value of \$200 each and the horse worth \$200 or \$300. He also testifies to a loss in the San Francisco Mountains, at the hands of the Cosnejo Indians, of 4 mules, worth \$250, "some coaches," and 2 freight wagons, the value of these latter articles not being estimated.

It is proper to state here that the loss of the four mules is the only loss to which Mr. Cooper is able to give competent testimony. As to the other losses, he only speaks from hearsay, unless the fact that he "saw the irons"

where some wagons or other articles had been burned, may be interpreted to have some slight bearing on the case. (See Rec., 17.)

The testimony of Mr. Craig, as far as touching the fact of the loss is concerned, is all hearsay, as appears from page 13 of the record, which reads as follows :

10. Question. Who had charge or management of said route for said Barrow, Porter & Co., and were the losses of property known to you of your own personal knowledge, or was it from reports of parties in charge of different stations ?

Answer. I was general superintendent of said line and had full authority to act for them. I don't know of my own personal knowledge of the loss of property that I have named, but I required of the different parties in charge of the different stations to report to me from time to time the losses of any property belonging to the company and the tribe or tribes of Indians taking or destroying said property.

Counsel for the Government here made objection to the introduction of witness's testimony as evidence in the case, moving to strike out the testimony of the witness heretofore given relating to the property taken or destroyed and the band or bands of Indians charged with having committed the depredations, for the reason that it now appears from the answers of said witness that these matters testified to are not within the personal knowledge of the witness, but are hearsay.

Except, then, as to the value of the several articles alleged to have been taken, the testimony of this witness can have no possible bearing on the case. The mules lost at Zuñi Station he says were worth \$200 each, and the

horse \$250. Of the property lost in the San Francisco Mountains he says that two of the mules were worth \$250 each, and the other four \$200 each. The coaches he values at \$275 to \$290, and the harness at \$53 a set. Of the property lost on the Colorado River, he values the mules at \$200 each, the coaches at \$275 to \$290, the harness at \$53, and the provisions at \$1,000 to \$1,200. His further testimony, as heretofore set forth, would seem to show, upon reasonable interpretation, that the mules were not worth, on an average, more than \$150 each. (See *ante*, p. —.)

The testimony of Mr. Barrow need not be considered, as he was neither present at any of the depredations nor in active charge of the route at any time. The valuation made by him, however, is not essentially different from that of the other deponents.

Taking the evidence of these deponents, that which is hearsay as well as that which is competent, and grouping it so as to show the several charges against the different Indians, we have, as the maximum which can be charged against them, the following: Against the Navajoes, 16 mules and 1 horse; against the Mohaves, 25 mules, 1 pony, 6 coaches, 6 sets harness, 1 wagon, and an uncertain quantity of provisions; against the Cosnejoes, 6 mules, 2 coaches, and 2 sets of harness.

Should we take the same evidence and group it in the same manner, taking wherever there is a variance as to the number of the articles of property lost the minimum number rather than the maximum, as above, we should have the following list: Against the Navajoes, 13 mules

and 1 horse ; against the Mohaves, 20 mules, 1 pony, 4 coaches, 1 wagon, 5 sets harness, and an indefinite quantity of provisions ; against the Cosnejoes, 4 mules, 2 coaches, and 2 sets of harness.

Now, rejecting such evidence as is hearsay and incompetent, and attaching to the several articles of property such values as seem to be fairly established by the evidence, we have, as the only charges which can be regarded in any event as established against the several tribes of defendant Indians, the following :

Against the Navajo Indians.

| | |
|------------------------------|----------|
| 13 mules, at \$150 each..... | \$1, 950 |
| 1 horse | 150 |
| Total..... | \$2, 100 |

Against the Mohave Indians.

| | |
|----------------------------------|--------|
| 20 mules, at \$150 each..... | 3, 000 |
| 1 pony | 75 |
| 4 coaches, at \$275 each..... | 1, 100 |
| 1 wagon | 150 |
| 5 sets of harness, at \$40 | 200 |
| Provisions | 700 |
| Total..... | 5, 225 |

Against the Cosnejo Indians.

| | |
|--|--------|
| 4 mules, at \$250 each..... | 600 |
| Total amount against all the tribes..... | 7, 925 |

In the foregoing the harness is listed at \$40 per set. In view of the fact that it had been used for some time a deduction on each set of \$13 from the cost price seems as little as would be warranted. The value of the provisions is put at \$300 less than is stated in the evidence to be

their value. However, the evidence touching upon these provisions is very meager. It is nowhere stated of what this indefinite quantity consists. Neither are any other facts stated from which one is in any way made aware of its value and make-up. It is merely "provisions"—indefinite, unqualified—which the witnesses say were worth \$1,000. The men had been out for some time when the loss occurred, and must by that time have used up a considerable portion of the whole amount taken with them. Under such circumstances a mere "rough guess" at the value of the amount remaining hardly possesses the character of sufficient definiteness upon which to base the finding of a court of justice. It is submitted that \$700 for the provisions would be as large a finding as could be warranted under all the circumstances of the case.

IV.

PORION OF CLAIM BARRED.

The different depredations forming the subject-matter of this suit were all committed during the year 1859. And so, unless a claim had been made for remuneration on account of such losses prior to the passage of the act of March 3, 1891, this would not be such a case as the court could consider; and such losses as these claimants did not attempt to recover for prior to the above date the court can not consider. That part of section 2 of the act referring to this subject reads as follows:

That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed, or has been or is pending, prior to the pas-

sage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner authorized under any act of Congress to inquire into such elaims.

The copy of the memorial to Congress, now on file among the evidence in the case, and the affidavit of loss filed in the Interior Department, signed by A. L. H. Crenshaw, and dated January 16, 1886, each gives the following schedule of losses :

At the hands of the Navajoes.

| | |
|-------------------------|----------|
| 14 mules, at \$200..... | \$2, 800 |
|-------------------------|----------|

At the hands of the Cosnejoes.

| | |
|-----------------------------|--------|
| 2 mules, at \$250 each..... | 500 |
| 1 mail coach..... | 150 |
| 3 mules, at \$200 each..... | 600 |
| | <hr/> |
| Total..... | 1, 250 |

At the hands of the Mohaves.

| | |
|------------------------------|--------|
| 4 mules, at \$200 each..... | 800 |
| 19 mules, at \$200 each..... | 3, 800 |
| 1 pony..... | 100 |
| 1 freight wagon..... | 150 |
| Harness..... | 100 |
| Provisions..... | 1, 000 |
| 3 mules, at \$200 each..... | 600 |
| | <hr/> |
| Total..... | 6, 550 |

| | |
|---|---------|
| Total at the hands of the three tribes..... | 10, 600 |
|---|---------|

Only for the articles of property above enumerated, then, can the claimants, in any event, be entitled to receive

remuneration. For the articles of property enumerated in the petition filed in this court, but not occurring in the above schedule, the claimant has no pretense of a right to indemnification, a claim on account of the loss of these articles never having been presented to the Secretary of the Interior, or Congress, or to any person "authorized under any act of Congress to inquire into such claims." As far as is concerned the right of the claimants to receive, in this court, remuneration for these articles of property, such articles may as well never have existed, or never been taken or destroyed by the Indians.

What their rights may be before Congress, or whatever action that body might see fit to take, is a totally different question. We are now only interested in knowing whether Congress has given them a right to sue for these articles in this court, and not in knowing whether they ever lost such articles, or whether they may be remunerated for their loss in any tribunal. But upon this point the language of the act is plain: "No claim accruing prior to July 1, 1865," says the statute, "shall be considered by the court unless the claim shall be allowed, or has been or is pending, prior to the passage of this act." A claim now made for articles of property not enumerated in the schedule presented to Congress and the Interior Department is plainly such a claim as the statute places beyond the consideration of the court.

All claims against the Government which had not been asserted for over twenty-five years the statute wisely decided should not be granted consideration at this late day. And it makes no difference that the articles to which ob-

jection is now made make up a part of a greater loss sustained at one and the same depredation. Should we seek a reason for this statutory bar, we will find the reason for debarring such articles as occur in the petition in this court and do not appear in the schedule originally filed, greater and more potent than that for a claim for the whole loss suffered at a depredation. In the latter case the claimant has slept on his rights merely; in the former, he is not only chargeable with laches, but the door is opened up to fraud and to charges of fraud. Such a bar is necessary, both in the interest of the Government and in that of the claimant; in the interest of the Government that it may not be defrauded, in the interest of the claimant that his reputation may not suffer; for what must we say when one makes claim against the Government for \$10,000 at the immediate time of his loss and for \$17,000 thirty years later? Were the error one of memory the earlier claim is the more credible; were the error one other than of memory, the claimant may be debarred of his whole right on the ground of attempted fraud.

We are only speaking generally now of the reasons which make it imperative that all articles of a claim such as are now under consideration should be debarred from consideration by the court. We are most certain that the claimants thoroughly believe in the justice of their whole claim as now made; and as general grounds have above been stated which might sound harsh to these claimants if left to stand unqualified, we would say further that in the rectitude and upright intentions of these claimants we have the utmost confidence. However, this does not vary

their rights in the case. Dangers are imminent should articles of property such as we are discussing be allowed a secure place in a claimant's petition. And not only are there dangers attending such a course, but the statute expressly prohibits it. It may, perchance, work a hardship in this case, but the general good and universal justice demand such a course. Under the principle of our law the individual must sometimes suffer for the good of the many.

The valuation placed upon the above property would seem, in the light of the more recent evidence, to be erroneous. Defendant's counsel submits that \$75 for the pony and \$150 each for the mules would be more proper. Upon this basis of estimation the total value of this property would be \$8,325.

Comparing the above schedule with that on page of this brief containing such articles of property as are by competent evidence shown to have been lost, we find that this latter shows, in addition to the losses contained in the former, the loss of one horse taken by the Navajoes and of four coaches and three sets of harness taken by the Mohaves. For these, then, on the basis of the above contention, claimants are not entitled to be indemnified. This leaves, as the maximum amounts which can in any event be charged against the several tribes of Indians, the following :

| | |
|-----------------------------------|----------|
| Against the Navajo Indians | \$1, 950 |
| Against the Mohave Indians | 3, 975 |
| Against the Cosnejo Indians | 600 |
| Total..... | 6, 525 |

EVIDENCE NOT SUFFICIENT TO CHARGE DEFENDANT
INDIANS.

While we have already admitted the evidence sufficient to show the loss of a considerable portion of the property enumerated in the petition, we are nevertheless forced to contend that this evidence does not show that the defendant Indians are guilty either of its destruction or its theft. Mr. Craig, Mr. Barrow, and Mr. Crenshaw know nothing of any of these alleged depredations except by hearsay. Whatever identification of the Indians is made must necessarily be that by Mr. Gilbert and Mr. Cooper, and if the evidence of these two is not regarded sufficient to cast the guilt upon the defendant Indians then the claimants must fail altogether.

Mr. Cooper's knowledge of these depredations, as shown by his own evidence (Rec., 17, q. 8), is exceedingly limited. It has been before mentioned that this witness at one time saw some irons where some wagons had apparently been burned. The irons were found, he said, "in the vicinity where the Cosnejo Indians resided." We leave the court to make any possible connection which may follow.

Of the loss of 4 mules charged to the Cosnejoes, this witness has given competent evidence. He attempts to cast the guilt of this theft upon the Cosnejoes in the following way (Rec., 17) :

5. Question. State the particulars concerning the taking of these 4 mules.

Answer. The 2 grays were picketed close to my camp, and they were taken away that night and must have been stolen. We tracked them some 15 miles.

They were going in the direction of the Cosnejo villages. We had guards out that night to watch the property.

6. Question. Is this the only reason you have for believing that these Indians took the mules?

Answer. There were no other Indians in that vicinity.

7. Question. Now with reference to the other 2 mules?

Answer. They were picketed out in the same way and disappeared in the same manner.

That "there were no other Indians in that vicinity" would seem to be a fact needing further and more convincing corroboration in order to warrant the court in rendering judgment against the Cosnejos upon that ground. It is doubtful if deponent's knowledge of the country was sufficient, or if he could have patrolled the country with that vigilance which would alone warrant a court in basing its judgment upon his statement. That the mules were going in the direction of the Cosnejo villages is nothing remarkable and proves nothing, especially as we are not told how far away these villages were, or whether there were any signs upon the trail indicating the presence of Cosnejo or any other Indians.

The only other evidence in the case assuming to go to the identity of the defendant Indians is that given by Samuel F. Gilbert. As to the alleged depredation by the Navajos, the following is regarded by the claimants sufficient to charge them :

9. Question. By whom were they driven away, if you know?

Answer. *By the Indians, we supposed. I do not know.*

10. Question. State what Indians, if any, lived or inhabited the country around Zuni station.

Answer. Navajoes.

11. Question. State in your own language all you know concerning the loss of these mules and that horse.

Answer. The mules disappeared during the night. We were encamped there; we had a guard out with them; that was our usual custom and we had one at that time. In the morning the mules were gone and the horse. We scoured the country for them as far as it was safe to do so and failed to find them. (Rec., 6.)

11. Question. How do you know that this depredation was committed by the Navajo Indians?

Answer. I have no way of knowing other than that they were the only Indians in that district. There were no white men or other Indians living in that country. The country was uninhabited, except by the Indians at that time.

12. Question. How do you know that they did not stray away?

Answer. Because we hunted the country so far as it was safe to do so, and that they would have returned to the camp themselves; that is the way they did all the time had they not been detained.

13. Question. Did these Navajo Indians frequent your camp prior to the time these mules were taken?

Answer. A very few of them. Perhaps a dozen.

14. Question. What was the distance to the nearest Navajo village?

Answer. I do not know. I might have known at that time, but do not know now.

15. Question. When did you first miss these mules in question?

Answer. About daylight the next morning after they were gone.

16. Question. What evidence did you then have that they were taken by the Indians, if any?

Answer. None further than that they were the only inhabitants in the country at that time. There were no men missing in our camp.

17. Question. Then your only reason for believing that these mules were taken by the Navajo Indians is the fact that these Indians inhabited the country around Zuni station and that there were no white men or Mexicans inhabiting that portion of country; that the mules were missing; that you made search for them and could not find them; that they never returned, and that there were none of the men missing from camp?

Answer. That is right. That is the only reason (Rec., 9 and 10).

35. Question. Are you acquainted with the tribe or tribes of Indians that inhabited that country around the Colorado River at the times these depredations were made? If so, state what tribe or tribes.

Answer. I am. Mojave Indians.

36. Question. Are you acquainted with the tribe or tribes of Indians that inhabited the country around the Zuni station? If so, what tribe or tribes?

Answer. I am. Navajo.

37. Question. Do you know anything about these four men who were with you at the camp on the Colorado River at the time these depredations occurred?

Answer. I do not. I can only remember the appellation of one of them. His name was Mountain Bill.

38. Question. State, if you know, if it is not a fact that it was generally known and understood by all the employés of the company that the Indians, Mo-

javes and Navajos, committed these two depredations which you have just testified to, one at the Zuni station and the other at the Colorado River station?

(To which question the counsel for the Government objected as incompetent, irrelevant, immaterial, and hearsay.)

Answer. It was so understood and known (Rec., 8).

32. Question. How do you know they were Mojaves?

Answer. Because they were the only Indians inhabiting the country at that time and we had with us one of our party who fled from this raid. Mountain Bill had been trapping among them for years, spoke their language, and was well acquainted with them, their manners and their customs. (Rec. 11.)

22. Question. Do you know how this property was lost or destroyed? If so, state how and by whom, together with all the incidents relating to its destruction or loss.

Answer. I did not see the herder killed nor the mules taken by the Indians. About noon on the day the herder was murdered I was in camp with four others when we discovered that we were being surrounded on the south and east by a band of perhaps 200 or more Mojave Indians. The Colorado River hemming us in on the west, leaving an outlet to the north of perhaps one-fourth of a mile, through which we immediately proceeded to make our exit. After fleeing from the camp the Indians took possession thereof, destroyed or carried away all of the portable property, provisions, harness, etc., and burned the coaches and wagons.

23. Question. Did you see them destroy these provisions and wagons?

Answer. We did not. We were looking for a fort then. (Rec., 7.)

It is submitted that the above evidence is not sufficient to charge any one of the bands or tribes of defendant Indians with the commission of the depredations. That by which the claimants would charge the Navajos and Cosnejos is especially lacking. As to these latter sufficient has already been said. As to the former the attention of the court is called, in the first place, to the fact that the only witness says merely that he "supposed" the property was taken by Indians. He did not "know." The Navajo Indians were in the country, and so the conclusion is drawn that they stole the mules. But this logic is strange as well as strained. It needs in its support the very remarkable major premise that no property in that country is ever lost unless taken by Navajo Indians. But for the logician to assume such a premise is to be illogical in his logic.

It would seem that some other evidence should be regarded necessary in order to charge these Indians with the depredation. The least that could be asked would be a showing that there was about the place and the trail some peculiar indication of the presence of Indians, and of Navajo Indians. But we are not made aware that an Indian arrow, or even a moccasin track, was seen. And as to the presence of Indians, or as to one having been seen, that is not even hinted at. And the witness himself, when asked by whom the stock was driven away, says frankly and flatly, "I do not know." If he, on the ground at the time, did not know who took the stock, defendants' counsel is unable even to imagine how the court can know who took it.

The property, alleged to have been taken by the Mohaves, the evidence shows to have been abandoned, and afterwards taken and destroyed by "Indians." Whether or not such Indians were Mohaves, defendants' counsel would not like to take the responsibility of saying. The evidence does not show that it was, unless the court shall consider it sufficiently proved that the Mohaves were the only Indians in that part of the country at the time.

This defendants' counsel leaves this question to the court without further argument.

VI.

DEFENDANT TRIBES OF MOHAVE AND COSNEJO INDIANS NOT IN AMITY OR TREATY RELATIONS.

At the time of the alleged depredations the Mohave and Cosnejo Indians were neither in amity nor treaty relations with the United States. That the Indians were in amity is a fact to be proved affirmatively by the claimant in order to give the court jurisdiction of the case. This the court has already held. It has also held that to show the existence of a treaty is to present "some evidence of amity." But in the case at bar there is nothing to show either amity in fact or the existence of treaty relations. It would seem, then, that the claimants must fail upon their own showing.

As to the matter of treaty relations, claimants' counsel, in their brief, have stated, generally, that "these Indians" were "in treaty relations" "at the time of the depredations of claimants' property." At the same time they call the attention of the court to the treaties with the Navahoes

“of September 9, 1849 (9 Stat., p. 974); of June 1, 1868 (15 Stat., p. 667); of July 1, 1852 (10 Stat., p. 797).” This latter treaty is not to be found in the statute book, as indicated, and the date attached to the second is subsequent to the date of the depredations which form the subject-matter of this suit. Then these treaties are foreign to the case. Again, a search through the statutes fails to reveal any treaties with the defendant Mohave and Cosnejo Indians made prior to the time of these depredations. Hence, as far as these Indians are concerned, there is no presumption of their amity. On the contrary, as they have never been in treaty relations with the United States there should be a presumption that they were not in amity.

Aside from any presumption, however, there is much evidence on file going to show the hostility of the Mohaves at that time. Although the defendants do not see the necessity, where there are no treaty relations existing, of showing a state of hostility, or lack of amity, to have existed at the time of an alleged depredation, nevertheless, this matter being in evidence, the attention of the court is directed thereto.

As to the attitude of these Indians the evidence of Samuel L. Gilbert shows the following facts:

22. Question. Do you know how this property was lost or destroyed? If so, state how and by whom, together with all the incidents relating to its destruction or loss.

Answer. I did not see the herder killed nor the mules taken by the Indians. About noon on the day the herder was murdered I was in camp with

four others when we discovered that we were being surrounded on the south and east by a band of perhaps 200 or more Mojave Indians. The Colorado River hemming us in on the west, leaving an outlet to the north of perhaps one-fourth of a mile, through which we immediately proceeded to make our exit. After fleeing from the camp the Indians took possession thereof, destroyed or carried away all of the portable property, provisions, harness, etc., and burned the coaches and wagons.

23. Question. Did you see them destroy the provisions and wagons?

Answer. We did not. We were looking for a fort then.

24. Question. How long after the raid by the Indians was it before you returned to the place of the camp?

Answer. The same evening or afternoon.

25. Question. State what you saw there, if anything at all.

Answer. I saw the remains of the wagon and coaches, the irons only; the rest was burned up. We saw flour scattered all over the gravel and sand and tracked over the ground.

26. Question. Who, if anyone, was in charge of the mules and pony at the time of this raid?

Answer. I was.

27. Question. How far from the camp were the mules and pony at the time of the raid?

Answer. About 1 mile.

28. Question. State if they were in charge of anyone, and, if so, whom.

Answer. They were in charge of a Mexican herder.

29. Question. Did you visit the place where the mules and herder were left after the raid; if so, how long after, and what did you see there, if anything?

Answer. I did not. Maj. Olmsted, who was in command of Fort Mojave, sent down a detachment of 25 men, I think, under command of Capt. Jones, I think. I went back to the camp to see what was left there. I found the condition as stated above.

30. Do you know what became of the herder?

Answer. I do.

31. Question. If so, state what.

Answer. He was buried after he was dead. This Mexican was shot full of arrows, and he was shot and his head was pounded into a jelly.

On page 10 of the record this same deponent recites the following circumstances preceding the depredation:

It was in camp about noon, perhaps a little later. I was washing a flannel shirt in a dinner dish pan and I heard a yell, an Indian yell, and knew what it meant, which attracted our attention, and on looking up to the south discovered a line of Indians extending east from the river bank perhaps a quarter of a mile; and north along the bluff running as fast as they could and yelling their peculiar war cry, seeking to cut off our retreat to the north in the direction of the fort. The herder and the mules had gone out in the morning and were in the bottom among the mesquite trees, about 1 mile south of the camp. At sight of the Indians and realizing the situation, myself with the other members of the company immediately fled to the fort, situated about 2 or $2\frac{1}{2}$ miles north.

That the Indians were hostile at that time is a fair presumption from the above evidence. A party of Indians out merely on foraging or thieving expeditions is only anxious to secure the booty, and only seeks to kill or capture when this is necessary to the accomplishment of the

primal object. Especially does this latter statement of the deponent indicate the hostile character of the Indians. From this it would seem that they were more intent on capturing the men in charge of the property than the property itself. Otherwise, why were they "seeking to cut off" the retreat of the party "in the direction of the fort?" If the mules and other property had been the primal object of their attack, it would seem more reasonable to suppose that the Indians would have been glad to have the men escape. All hindrances, to say nothing of dangers, would then have been out of their way. That they were, first of all, intent on the capture of the men at the camp is a weighty, if not ponderous, commentary on their attitude toward the white man.

In addition to the above, which would seem to be conclusive against the amity of the Mohave Indians, there is still other evidence on file which establishes beyond a doubt the hostility of these Indians. This evidence has not been printed, but will be found with the other papers in the case. Among such evidence is an affidavit of Enoch Gilbert, dated November 26, 1859, in which he states:

I certify that I started with the Stockton (Cal.) and Kansas City mail of 1st January, 1859, from near Fort Tejon, Cal., in a six-mule coach, and met Col. Hoffman's command of about 50 men on his return from the Rio Colorado on the Mohave River, at or near the round hole on the Mohave River, January 16, 1859. The colonel informed me that he had had a skirmish with the Mohave Indians on the morning of the 9th of January; that he killed 10 or 15 of them, and that the Indians were very much enraged and very hostile; so much

so that he had made a shorter stay on the river Colorado than he had at first contemplated. I then inquired of the colonel what he thought of my attempting to cross the Colorado with my party of five men, to which the colonel gave no definite answer. I then talked with Lieut. Chapman and others of the command, all of whom stated in positive terms that it would be folly for me to make an attempt to cross the Colorado; that should I venture to the river we would surely be cut off by the Indians. I then turned back and camped that night near Col. Hoffman's camp, where I learned further particulars. The colonel then informed me that he arrived at Lieut. Beale's crossing on the Colorado on the 7th and left early in the morning of the 9th of January; that when he went to the river he had intended to stay four or five days and select a site for a fort, but he found Indians so hostile and formidable that he thought it prudent to leave, remaining there only two nights and one day. I learned from others of the command at this place that the colonel thought the Indians were dangerous; that he made a forced march the first day, traveling to the Marl Springs before pitching camp, a distance of 60 to 65 miles. The march was so rapid that a portion of their mules gave out and were left on the road. Colonel Hoffman then went to San Francisco; there reënforced and returned to the Colorado via the Gulf of California and Fort Yuma, and reached Beale's crossing about the 19th of April, 1859.

Attached to the above is a joint certificate or affidavit of W. C. Smith, road agent, and Wesley Cooper, conductor, which reads as follows:

We hereby certify that we are fully cognizant of the facts set forth in the foregoing statement of Enoch

Gilbert, being in the employment of the mail company of Barrow, Porter, and Crenshaw, and that we were present in the vicinity when the depredations of the Mohave Indians were committed.

The affidavit of Wesley Cooper, bearing date the 19th of March, 1859, after reciting the various vicissitudes of the route, makes the following statement relative to the attitude of the Indians :

He * * * did thus proceed to the Colorado River, where he intended and expected to cross the same, but upon his arrival there he found there were, on both sides of said river, so many Indians believed to be hostile Mohave Indians ; this affiant believes there must have been at least 500 Indians, and from every sign, signal, and demonstration, it was perfectly evident to this affiant they were bent on hostilities, and he has every reason to believe and does verily believe that it was morally impossible for him and his men to take the mail across the river, or for them to have crossed said river ; and thus finding it impossible to cross without the most imminent danger, if not certain death to cross, he returned the said mail.

Under date of September 12, 1859, W. C. Smith makes the following affidavit :

I left Santa Fe with the February mail, and met the January mail returning, and was informed by them that it was impossible to cross the Colorado River, owing to the hostilities of the Mohave Indians, until the troops arrived there, and I stopped and waited until I ascertained that the troops were there, then both those mails went on and were delivered at Stockton.

On the 26th day of November, 1859, in a second affidavit made that same day, Enoch Gilbert testifies as follows :

I certify that the mail which left Stockton, Cal., for Kansas City, No. 15050, 1st April, 1859, was carried to near the crossing of the Colorado River in regular time. On account of the open hostilities of the Mohave Indians, who had for the past three or four months murdered all who came in contact with them, it was deemed prudent to wait until Col. Hoffman's military operations against them had commenced before attempting to proceed. * * * I arrived at the crossing on the Colorado River on the 20th day of July, 1859. On the evening of that day the Mohave Indians attacked our herd of mules and killed one man, and drove off nineteen head of mules and one horse. On the next day, the 21st, whilst we were engaged in moving our camp, the Mohave Indians attacked us, drove our men off, killed the mules in the wagon, and robbed the wagon of its contents.

On the 20th day of May, 1859, William H. Pool makes affidavit as follows :

The March mail he received at Elizabeth Lake, 40 miles from Tejon ; brought it to the Colorado River in company with forty-two men, and found that we could not cross the river on account of the hostilities of the Indians, and we were compelled to turn back. We remained five days on the left bank of the Colorado River ; stretched our ropes in two different places to cross. The Indians shot into our boat each time. We then went back to Pah-Ute Creek, a distance of 25 miles, waiting for Col. Hoffman's command to protect and cover us while crossing. We remained there twelve days ; we then divided our company and

sent our wagons back; took twenty men and went 20 miles up the river and crossed. We had a skirmish with the Indians before turning back, and killed seven of them. The party was detained twenty-one days. The February mail came within 25 miles of the river, and met Col. Hoffman's command retreating from the Indians.

The above evidence would not seem to require comment, as but one conclusion can by any possibility follow from such a course of conduct on the part of the Indians as is described by these witnesses. One feature of it, however, demands notice, and that is its value.

The affidavits from which the extracts have been taken are not originals; neither are they certified copies. Just what is their origin, and when and where they first made their appearance in the public files, is impossible of absolute determination. It is possible, however, to now create for them a history both plausible and reasonable.

There is on file an original affidavit, made by Enoch Gilbert on the 24th day of February, 1860. There is also on file an exact copy of this affidavit in the same handwriting as the text of the affidavit itself. At the head of the copy is written, "Copy, Original in House Comm'? on Indian Affairs." The handwriting of these other papers—the memorial to Congress and the affidavits thereto attached, from which we have quoted—is the same as that of the original affidavit of Mr. Gilbert and its copy. Upon these former is an indorsement which seems to have been made in the office of the Clerk of the House of Representatives. Now from these facts we are led to suppose that the memorial and affidavits were made in

duplicate, one set sworn to and the other retained as copies ; that the originals, with the exception of the one affidavit of Mr. Gilbert, were lost by the House committee and their places supplied with the copies formerly made.

But whatever may be the origin of these papers, the fact still remains that the claimants have presented them before Congress probably, and before the Interior Department certainly, and have relied upon them to make out their right to indemnification. They have sought to use them against the Government in support of what they alleged to be their rights, and in so doing have made them a part of those records which come, as a matter of course, to this court. After attempting to benefit by these papers, after affirming their genuineness by direct and positive acts in the prosecution of their claim, it would seem that they are estopped now from denying such records a place in the trial of this cause ; and that these papers which the claimants have used against the Government are now a proper and efficient defense to be used by the Government against the claimants.

Whether or not the court shall agree with the defendants in this contention is of little moment, for this evidence, if it be given weight, goes to the determination of the amity of the Mohave Indians alone. And these Indians, as we have shown, had not up to this time entered into treaty relations with the United States. The other and unquestioned evidence of the claimants, too, not only does not show a condition of amity, but a condition of positive hostility. There is no evidence of amity, posi-

tive or presumptive, to be overcome by the defendants. The same may be said as to the Cosnejo Indians. The petition, then, as far as it pertains to these two tribes, must be dismissed.

VII.

DEFENDANT NAVAJO TRIBE OF INDIANS NOT IN AMITY.

At the time of the depredations charged against the Navajo Indians said Indians were not in amity with the United States. These Indians have always been a wild and troublesome set. A treaty was made with them in 1850, but its terms had been imperfectly observed by the Indians, and from that time until the middle of 1858 there had been a continuous series of outbreaks, wars, and attempted treaties. Several treaties were made, or agreed to, during these years and as often broken. (See Senate Document, second session, Thirty-fifth Congress, p. 540.)

In the middle of the year 1858 began what was probably the most severe and far-reaching of all these wars of the Navajoes. For the earlier beginnings and causes which led to the final campaign against them by the United States troops, the court is referred, should it desire such information, to the report of the Secretary of War for 1858. We are only directly interested, however, in their attitude toward the Government and its citizens in January, 1859. To ascertain this the attention of the court is called to a few extracts from the reports of the Secretary of War and Commissioner of Indian Affairs for 1858 and 1859.

On the 1st day of August, 1858, Gen. Garland, commanding in New Mexico, reported to the headquarters of the Army of the United States as follows:

The inclosed reports from Bvt. Maj. Brooks, Third infantry, commanding Fort Defiance, marked A and B, will apprise Lieut. Gen. Scott, commanding the Army, of the critical condition of affairs in the country of the Navajo Indians. These Indians have assumed a boldness in their forays of late which forces upon me the necessity of opening a campaign against them with not less than 1,000 men; they are understood to number 2,500 warriors. I have already ordered a mounted company from Fort Stanton and a foot company from Fort Craig to repair to Albuquerque in order to escort supplies for Fort Defiance, and if necessary to join its garrison. As soon as Col. Loring returns I design to send two fresh companies from Fort Union, and a company of infantry from Cantonment Burgwin, to take part at Abiquie, to be joined whenever necessary by a company of guides and spies. (Senate Document, V. 2, second session, Thirty-fifth Congress, p. 293.)

On the third day of September, 1858, Lieut. Col. Miles writes the adjutant-general at Washington:

I have the honor to report, in obedience to department order (special) No. 73, present series, I arrived at this post on yesterday afternoon in command of Company A, mounted rifles, Capt. Elliott and Lieut. Lane, and 59 rank and file; and Company C, Fifth infantry, Second Lieut. Hildt and 65 rank and file.

On the 29th ultimo Capt. McLane, mounted rifles, while passing Bear Spring, was attacked by a party of Navajoes; he reports he killed six or eight, and was wounded in the right side himself, which will disable him for the next twenty days. This fight

has precipitated matters, and makes war inevitable. I shall commence operations in the field on the 8th instant with 310 rank and file, leaving at this post, under Bvt. Maj. Brooks, Fifth infantry, a force of 120 rank and file. These Indians, it is stated, can bring from 1,500 to 2,000 warriors into the field; report says they have assembled at Canon de Chey. I shall march to meet them wherever they may be found. (*Id.*, p. 298.)

On the first day of October, 1858, Col. Bonneville, commanding in New Mexico, reported to Army headquarters as follows :

I have the honor herewith to transmit, for the information of the lieutenant-general commanding the Army, the following documents relating to affairs with the Navajoes Indians :

Paper marked A, copy of instructions from superintendent of Indian affairs to Mr. Yost, agent for the Navajoes.

B and C, copies of the agent's reports to the superintendent, wherein the agent, after having held a council with the Navajoes, closes all negotiations and turns them over to the military for chastisement.

D, copy of Lieut. Col. Miles' report of the 8th instant, informing the department commander of his taking the field.

E, copy of my instructions thereon, approving his course, in consequence of the murder of a Mexican captive and the bringing the dead body into Fort Defiance, and offering it as the body of the murderer demanded; and the fact that the agent had closed all negotiations and placed the subject in the hand of the military.

F, copy of my instructions thereon, approving his operations and directing him to continue, but at the

same time not to allow any opportunity of terminating hostilities to escape. * * *

The lieutenant-general is aware at the time I came into command of the department, September 16, hostilities had already commenced. Negotiations, however, were still pending, and, as a precautionary measure, I issued orders for the troops most distant to approach, to support the negotiations, defend the settlements, and, if necessary, to take the field. The war had actually commenced before the companies had arrived at the posts assigned them. (*Id.*, p. 301.)

Under date of September 8, 1858, Lieut. Col. Miles, commanding Navajo expedition, writes the assistant adjutant-general at Santa Fé:

My orders, No. 4, will inform you on to-morrow morning I declare war and march against these Indians, to find them where I can, for not a guide with me knows the country. * * * (*Id.*, p. 308.)

Subsequent reports of the officer in command set forth various engagements with the Indians, attended with considerable loss on each side, during the remainder of the year. In December Col. Bonneville began negotiations for a treaty, and on December 25 such negotiations culminated in an agreement signed by the Indians, which, upon ratification by the President and the Senate, was to become a treaty. With this treaty Col. Bonneville, in General Orders, No. 11, announced the war with the Navajoes to be at an end. (See Senate Document, first session, Thirty-sixth Congress, p. 273.)

In regard to this treaty, it is to be observed, in the first place, that it was never ratified or promulgated, and so was never more than an agreement upon condition. That

is, the Indians agreed to abide by its terms if the Government should adopt this action of the Army officer and make the treaty their own. But the Government never so acted, and so was itself never bound by its terms. But in a treaty, as in a contract, both parties must be bound or neither is bound. Then this treaty, or rather this document which was to be a treaty, should it be ratified by the President and Senate, had no effect whatsoever upon either the theoretical or actual relations of the Government with the Indians. Should we fail to find, then, after this attempt to make a treaty, a condition of friendship and good will existing between the Indians and the Government and its citizens, we must conclude that the Indians were not in amity. That this condition did not exist, that the Indians still continued hostile and troublesome, stealing and destroying property and killing citizens, we find proclaimed in the reports of the Secretary of War and Commissioner of Indian Affairs.

The reports show that, although the words of the army officers proclaim peace, their operations declare war. They report at headquarters that the war is closed, and yet remain in the field regarding the Indians with doubt. January 18, 1859, was at best but a breathing spell during which each side watched the other with inquiring eyes; the troops to note whether the Indians really desired peace and were willing to keep it, the Indians to make out how they could best get the better of the army—how they could feign peace and continue their hostility. To follow the history of these times is to be convinced that the hostility of the Navajoes continued, at the least, far into the year 1859.

will be good. Capt. Macomb, topographical engineers, is to accompany this detachment. His duty will be to examine for a road from Abiquin to the mouth of the Tuni Chey, on the San Juan River, which is in close proximity to the largest and most fertile planting grounds of the Navajoes. The command having escorted Capt. Macomb on this duty will continue its explorations to Fort Defiance. Another detachment of 100 men, under Capt. Sykes, from Los Lunas, will proceed to Fort Defiance, and on his way there visit Laguna, Cuvero, and Zuni. These two detachments having arrived at Fort Defiance will unite with the garrison, making a force of about 650 men, under the command of Maj. Simonson or Shepherd. This force, divided into two or three columns, will continue slowly to explore the country to the northwest, west, and southwest, returning to their posts when the grass begins to fail. Capt. Macomb will be thus enabled to furnish the department with exact information regarding the Navajo country; their bands, numbers, grazing grounds; in fact, everything that it may be necessary to know. All these expeditions are to move with pack mules. (*Id.*, p. 295.)

On August 12, 1859, the acting assistant adjutant-general issued the following order :

The department commander directs me to inform you that the new agent for the Navajoes, Mr. Kendrick, carries out further instructions from the superintendent of Indian affairs in regard to those Indians. Upon his application you will take possession of any Indians in flocks he may designate, and hold them subject to his orders. Should he require you to punish any one party of the Indians you will do so; but this is not to be considered as a declaration of war against the whole nation, the department commander

reserving to himself the right to declare a general war against the Navajoes after consultation with the superintendent of Indian affairs. (*Id.*, p. 312.)

And on September 10, the following :

By direction of the department commander I inclose you a letter just received by him. It informs of an outrage committed by Indians, supposed to be Navajoes. You will immediately investigate this, and if the depredators should be Navajoes punish them at once. (*Id.*, p. 337.)

The report of the Commissioner of Indian Affairs speaks even more plainly than such reports of the commanding officer in New Mexico as have been incorporated in the report of the Secretary of War. This report of the Commissioner leaves no room for doubt that the attitude of the Indians continued after the attempted treaty the same as it was before the negotiations were had. On November 26, 1859, the Commissioner himself says:

From the reports of the superintendent and agents in New Mexico the condition of Indian affairs in that Territory seems to be gradually improving, though that populous and warlike tribe, the Navajoes, continue to act in bad faith, and will probably have to be more thoroughly chastised in order to impress upon them a proper sense of their treaty obligations and to compel them to desist from the continued depredations and outrages upon our citizens.

The report of J. L. Collins, superintendent of Indian affairs for New Mexico, is appended to the report of the Commissioner. Mr. Collins, under date of September 17, says :

The question with the Navajoes still remains unsettled. Special Agent Baker has been relieved by

Agent Kendrick. His report, which I now inclose, contains important and highly interesting information in reference to this troublesome tribe. Letters of instruction, now in the hands of Agent Kendrick, were given him for his government in the management of those Indians. In these instructions I adhere to the terms of peace agreed upon with the tribe last December, and I have virtually demanded the enforcement of those terms. It will be remembered that I was opposed to the closing of the war with those Indians last winter when it was closed. I then thought that they had not been sufficiently chastised, and that the war would result in no practical good. Subsequent events proved, however, that I was right. They have continued to rob and murder, as they have been doing for years; and this has been kept up, notwithstanding the troops have been patrolling their country ever since the commencement of June. On the 5th of this month they murdered two Mexicans, near Albuquerque. This makes four men killed by them since the conclusion of peace. To these murders may be added a series of robberies, some of them embracing a large amount of property. We are at this moment in receipt of the news of another robbery, committed a few days since, on the Rio Grande below Albuquerque. Col. Bonneville, commanding this department, has acted with commendable promptitude in placing a body of troops in their country, which has occupied it during the summer. But there seems to be an unwillingness on the part of the troops to force the Indians to a compliance with the terms of the treaty of peace, by making reprisals of property to indemnify the citizens for losses sustained by them, and which was secured by the terms of the treaty. The whole object of the treaty turned upon this point. It was for this that

the Indians were left in the hands of the military. If all the terms were not fully complied with it was to be no peace. I had no hope that the Indians would, of themselves, fulfill the terms of the treaty ; indeed, I knew they would not, and that force would have to be used if anything was accomplished. It will be seen from Mr. Baker's report that he sustains this opinion.

Some stock is reported to have been returned by the Indians in compliance with the treaty, but the manner of doing it proves very clearly that they do not intend to act in good faith, for the stock returned is not that taken from the citizens but the refuse of their own flocks, of no value whatever. I am not advised when the troops are to be withdrawn from the Indian country, but it will doubtless be done soon, and I fear without having done anything to force the Indians into a compliance with their treaty obligations.

Every consideration demands that the present state of things with this tribe be settled and terminated ; until this is done no permanent security can be expected for the citizens. They are in a constant state of disquietude and alarm, which retards the advancement and prosperity of the Territory, rendering property and even life insecure, besides being a positive injury to the Indians themselves.

The only policy, in my opinion, that can be adopted for the successful management of the Navajoes should be based upon a rigid enforcement of all their treaty obligations. We should never allow a murder or robbery to go unpunished ; each violation of law or treaty stipulation should be followed by prompt and immediate chastisement. They deserve no mercy at our hands and should be taught to expect none.

The presents sent out for distribution to the Navajoes this summer are yet in store with the superin-

tendent and will not be sent to the agency until this difficulty is settled; for I am satisfied that the withdrawal of the troops from the Indian country will be followed by an increase of crime.

The reports from which the foregoing extracts have been taken are more meagre than is in the interest of the complete perspicuity of the case at bar, and yet there seems to be sufficient material in the quotations we have given to show a continuous state of hostility far beyond the date of the depredation of which complaint is here made. Should this not seem sufficient, the treaty made with these Indians on September 9, 1859, and ratified by the President and the Senate just a year later, would seem to conclude the matter. This treaty and the negotiations attending its consummation, important matters as they were in the Navajoe campaign, are nowhere alluded to in any of the reports from which the above excerpts have been taken, and, so far as Government's counsel can ascertain, in none other of the executive documents. On page 974 of the ninth volume of the United States Statutes at Large is its text in full, signed by J. M. Washington, brevet lieutenant-colonel commanding, and James S. Calhoun, Indian agent, on the part of the Government, and by Mariano Martinez, head chief, and Chapitone, second chief, on the part of the Indians.

September 9, 1860, then, was the first real, as well as the first theoretical, ending of the hostilities with the Navajoes. September 9, 1858, war was formally declared on the part of the Government, and September 9, 1860, it was formally closed. After hostilities have once begun the presumption is that they continue. And after the

Government has shown that hostilities did exist, without a scintilla of doubt, less than a month before the perpetration of the depredation, it is then incumbent upon the claimant to show that such hostilities ceased and that a state of amity ensued before the depredation was committed in order to overcome the presumption that hostilities still continued. This is strictly in accordance with the established rules of evidence. Mr. Greenleaf, in his work on evidence, volume 1, section 41, says.

Other presumptions are founded on the experienced *continuance* or permanency of longer or shorter duration in human affairs. When, therefore, the existence of a person, personal relation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before until the contrary is shown, or until a different presumption is raised from the nature of the subject in question.

The "state of things" here is the hostility existing between the Government and Indians; and this being shown to exist, the law presumes it to continue until the other party shall show that it has ceased. Especially is this so where open hostility is shown so recently before the date in question. The conclusion of continued hostility is unavoidable.

Again, it has been shown not only that actual war existed shortly before the depredation, but also that the troops were in the field at the time of the depredation and subsequent to it; that they were there to fight and "chastise" the Indians, and did chastise them, and that they remained there until and long after September 9, 1859, when a treaty of peace was formally concluded. Now, to

say that during one particular month of this time the Indians were hostile and that during some other month of the same period they were in amity seems an absurdity too apparent to demand consideration. It may be said with as much reason that one day they are at war, the next day at peace ; that on January 9 they are in hostility and on January 10 in amity. To allow such a doctrine must eventually involve the court in inextricable confusion, and either the claimant or the defendants in hardships irreconcilable with any consistent ideas of justice.

It thus appears that the defendant Navajoe Indians were not in amity with the United States at the time of the depredations charged and that the petition against them also should be dismissed.

L. W. COLBY,
Assistant Attorney-General.



